Supreme Court, U.S.
FILED

041575 MAY 24 2005

OFFICE OF THE CLERK

No. ___

IN THE

Supreme Court of the United States

THEOPHILE CARTY,
Petitioner,

v.

ALBERTO GONZALES, ATTORNEY GENERAL,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

PETITION FOR A WRIT OF CERTIORARI

EDWARD P. SANGSTER
MATTHEW G. BALL
DYLAN B. CARP *
KIRKPATRICK & LOCKHART
NICHOLSON GRAHAM LLP
4 Embarcadero Center, 10th Floor
San Francisco, CA 94111
(415) 249-1000

* Counsel of Record

Counsel for Petitioner

May 20, 2005

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

QUESTIONS PRESENTED

This Court has already rejected the contention that fraud is implicit in the concept of "evading" for purposes of the federal statute of limitations for tax crimes. Is fraud implicit in the concept of tax evasion, even where there is no deceit, making that crime one of moral turpitude and supporting an order of deportation under the removal provisions of the Immigration and Nationality Act?

This Court has held that, because deportation is a drastic measure, courts will not assume that Congress meant to require deportation beyond that which is required by the narrowest of several possible meanings of the words used. Does this rule of construction apply to state laws that lead to deportation if not construed narrowly?

PARTIES TO THE PROCEEDINGS BELOW

The Petitioner below was Theophile Carty. The Respondent below was Alberto Gonzales.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDINGS BELOW	ii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	2
STATUTORY PROVISIONS	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE PETITION	4
I. THE PANEL MAJORITY CONTRADICTED *SCHARTON* WHEN IT CONCLUDED THAT FRAUD IS IMPLICIT IN THE CONCEPT OF TAX EVASION ABSENT DECEIT	4
II. THE PANEL MAJORITY FAILED TO GIVE THE WORDS OF THE STATE STATUTE THEIR NARROWEST POSSIBLE MEANING, IN CONTRADICTION OF *FONG*	7
CONCLUSION	8
APPENDIX A, Opinion of the U.S. Court of Appeals for the Ninth Circuit, January 19, 2005	1a
APPENDIX B, Order of the Board of Immigration Appeals, March 18, 2003	12a
APPENDIX C, Order of the Immigration Judge, November 26, 2002	13a
APPENDIX D, 8 U.S.C. Section 1227	25a
APPENDIX E, Cal. Rev. and Tax Code Section 19406	38a

TABLE OF AUTHORITIES

FEDERAL CASES	Page
Chiarella v. United States, 445 U.S. 222 (1980)	6
Fong v. Phelan, 333 U.S. 6 (1948)	7, 8
Goldeshstein v. INS, 8 F.3d 645 (9th Cir. 1993)	5
Hernandez-Martinez v. Ashcroft, 329 F.3d 1117 (9th Cir. 2003)	2
Huerta-Guevara v. Ashcroft, 321 F.3d 883 (9th Cir. 2003)	2
Khan v. Barber, 253 F.2d 547 (9th Cir. 1958)	5
Tseung Chu v. Cornell, 247 F.2d 929 (9th Cir. 1957)	5
United States v. Carrollo, 30 F. Supp. 3 (W.D. Mo. 1939)	4
United States v. Donahue, 1993 WL 114031 (E.D. Pa. April 13, 1993)	7
United States v. Scharton, 295 U.S. 518 (1932)	*passim*
FEDERAL STATUTES	
8 U.S.C. Section 1227(a)(2)(A)(ii)	2
28 U.S.C. Section 1254	2
STATE STATUTES	
Cal. Rev. & Tax. Code Section 19406	2, 3
Cal. Civil Code Section 1709	5
MISCELLANEOUS	
In re Carlos Alas Mazza-Alas, 15 Immig. Rptr. B1-88 (BIA Oct. 27, 1995)	6

IN THE

Supreme Court of the United States

No. ___

THEOPHILE CARTY,

Petitioner,

v.

ALBERTO GONZALES, ATTORNEY GENERAL,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

PETITION FOR A WRIT OF CERTIORARI

Petitioner Theophile Carty prays that this Court issue a writ of *certiorari* to review the opinion and judgment of the United States Court of Appeals for the Ninth Circuit filed January 19, 2005.

OPINIONS BELOW

The January 19, 2005 Panel Majority Opinion of the United States Court of Appeals for the Ninth Circuit (Appendix ("App.") A at 1a) is reported at 395 F.3d 1081. The March 18, 2003 order of the Board of Immigration Appeals dismissing Carty's appeal from the Immigration Judge's order (App. B at 12a) is unreported. The November 26, 2002 order of the Immigration Judge ordering Carty removed from the United States (App. C at 13a) is unreported.

JURISDICTION

The judgment of the court of appeals was first entered on January 19, 2005. Petitioner timely filed a petition for rehearing and suggestion for rehearing en banc, which was denied on April 13, 2005. This timely petition for writ of *certiorari* followed. The Court has jurisdiction in this case pursuant to 28 U.S.C. Section 1254(1).

Although this Court does not have jurisdiction to consider challenges to removal orders brought by aliens who are removable because they committed two crimes of moral turpitude not arising out of a single scheme of criminal misconduct, 8 U.S.C. Section 1252(a)(2)(C), this Court has jurisdiction to examine its own jurisdiction. *Huerta-Guevara v. Ashcroft*, 321 F.3d 883, 884 (9th Cir. 2003). As part of its jurisdictional inquiry, this Court may examine Carty's contention that he is not an alien removable by reason of having been convicted of two crimes of moral turpitude.

Hernandez-Martinez v. Ashcroft, 329 F.3d 1117, 1118 (9th Cir. 2003). Moreover, if this Court finds that Dr. Carty is not an alien removable by reason of having been convicted of two crimes of moral turpitude, this Court has jurisdiction to vacate the BIA's order of removal. *Huerta-Guevara*, 321 F.3d at 888.

STATUTORY PROVISIONS

This case involves 8 U.S.C. Section 1227(a)(2)(A)(ii) and California Revenue and Taxation Code Section 19406.

STATEMENT OF THE CASE

Dr. Carty immigrated to the United States from the island of Anguilla in April of 1965. Dr. Carty became a lawful permanent resident of the United States on April 1, 1975. Dr. Carty developed a successful medical practice, with three medical clinics and various satellites in the Watts neighbor-

hood of Los Angeles, California, and employed several other physicians.

In August of 1995, the State of California filed an Information against Dr. Carty that charged him with several criminal violations. Dr. Carty pled *nolo contendere* to two of those violations on January 1, 1996; both were for failure to file an income tax return in violation of California Revenue and Taxation Code Section 19406.[1] On May 15, 2001, Dr. Carty pled guilty to attempted bribery of a government official.[2]

On July 12, 2002, the INS filed a Notice to Appear with the Immigration Court, charging that Dr. Carty was subject to removal on the ground of being an alien convicted of two or more crimes involving moral turpitude. The Immigration Judge issued an oral decision on October 24, 2002, ordering Dr. Carty to be removed from the United States to Anguilla. After the Immigration Judge on his own motion reopened the removal proceedings against Dr. Carty for further proceedings, on November 26, 2002, the Immigration Judge reinstated the prior oral decision and order of removal.

On December 18, 2002, Dr. Carty timely appealed the November 26 order to the Board of Immigration Appeals. On March 18, 2003, the BIA affirmed the decision of the Immigration Judge in a per curium decision, and dismissed the appeal.

On March 31, 2003, Dr. Carty filed a timely *pro se* petition for review with the Ninth Circuit, along with a motion to stay deportation. On July 11, 2003, the Ninth Circuit granted the

---

[1] The California legislature repealed Section 19406 effective January 1, 1994, and replaced it with the substantially identical Section 19706. *See* Cal. Rev. & Tax. Code §§ 19406; 19706 (Westlaw 2004). The Information charged Dr. Carty with conduct occurring in 1991 and 1992.

[2] Dr. Carty did not raise the issue of whether attempted bribery of a government official is a crime of moral turpitude below, and does not raise it before this Court.

stay of deportation, which remains in effect. On January 19, 2005, a three-judge panel of the Ninth Circuit, over one dissent, dismissed the petition for review for lack of jurisdiction.

The two-judge majority held that "[i]ntent to defraud is implicit in willfully failing to file a tax return with the intent to evade taxes." (App. at 4a-5a). The majority reasoned that false or deceitful conduct is not a necessary element in determining whether a crime involved moral turpitude. (App. at 4a-5a & n.6).

The dissenting judge disagreed, noting that this Court in *Scharton* "expressly rejected the argument[] presented by the government that 'fraud is implicit in the concept of evading . . .'" (App. at 11a) (Canby, J., dissenting). The dissenting judge would have held that "some false or deceitful conduct" is a "necessary characteristic" for a crime to inherently involve fraud, so the mere failure to file an income tax return, even with the intent to evade taxes, does not inherently involve fraud.

REASONS FOR GRANTING THE PETITION

I. THE PANEL MAJORITY CONTRADICTED *SCHARTON* WHEN IT CONCLUDED THAT FRAUD IS IMPLICIT IN THE CONCEPT OF TAX EVASION ABSENT DECEIT.

"[A]n attempt to evade the payment of a tax . . ., unlawful as it is, immoral as it is, is [not] an act evidencing baseness, vileness, or depravity of moral character." *United States v. Carrollo*, 30 F. Supp. 3, 7 (W.D. Mo. 1939). "The number of men who have at some time sought to evade the payment of a tax or some part of a tax to some taxing authority is legion." *Id.* "Any man who does that should be punished civilly or by criminal sentence, but to say that he is base or vile or depraved is to misuse words." *Id.*

Since the *Carrollo* case, courts have established a baseline for crimes that potentially subject the wrongdoer to banishment under the nation's immigration laws: Carty's tax evasion must inherently involve fraud or have fraud as an essential part in order to be a crime of moral turpitude. *Goldeshstein v. INS*, 8 F.3d 645, 646-47 (9th Cir. 1993); *Tseung Chu v. Cornell*, 247 F.2d 929, 934-35 (9th Cir. 1957); *Khan v. Barber*, 253 F.2d 547, 549 (9th Cir. 1958).

This Court has already spoken on whether evasion inherently involves fraud, albeit in a non-immigration context. In *United States v. Scharton*, 295 U.S. 518, 520-22 (1932), Scharton was charged with attempts to evade taxes by falsely understating taxable income. The applicable statute of limitation for offenses "arising under the internal revenue laws of the United States" was three years, with a proviso that "for offenses involving the defrauding or attempting to defraud the United States" the statute was six years. This Court rejected the government's contention that "fraud is implicit in the concept of evading," and held that the proviso did not apply to the offense of tax evasion.

The result in *Scharton* is compelled by the common law elements of fraud. Fraud is defined in California (the place of Carty's wrongdoing) as follows: "One who ***willfully deceives*** another with intent to induce him to alter his position to his injury or risk, is liable for any damage which he thereby suffers." Cal. Civil Code Section 1709 (emphasis added). Further, fraud requires an act of commission, rather than mere omission. B.E. Witkin, Summary of California Law, Torts, § 697 at 799 (9th ed. 1988) ("Although material facts are known to one party and not the other, ***failure to disclose them is ordinarily not actionable fraud*** unless there is some fiduciary relationship giving rise to a duty to disclose") (emphasis added); *see also Chiarella v. United States*, 445 U.S. 222, 227-28 (1980) ("one who fails to disclose material informa-

tion prior to the consummation of a transaction commits fraud only when he is under a duty to [disclose]").

Indeed, when the BIA first addressed whether failure to file a tax return with the intent to evade taxes was a crime of moral turpitude, the BIA concluded that the answer was "no." *In re Carlos Alas Mazza-Alas*, 15 Immig. Rptr. B1-88 (BIA Oct. 27, 1995)[3]. This conclusion makes sense. Failure to file a return—unlike filing a false return—does not inherently involve deceit, a necessary element of fraud.

Here, Carty was not accused of deceiving California's taxing authorities or engaging in any wrongful act of commission. He was not accused of filing a false or fraudulent tax return, nor was he accused of lying to or misleading the taxing authorities. As Judge Canby explained in his dissent, the Panel Majority did not claim that Carty's crime involved the use of false statements or counterfeit documents, or other false or deceitful conduct. (App. at 10a) (Canby, J., dissenting) (explaining that "some false or deceitful conduct" is a "necessary characteristic" for fraud). Nor did the State of California allege that Carty was the State's fiduciary. Instead, Carty was convicted for a sin of omission: he failed to file a tax return with the intent to evade taxes. In the absence of deceit or a wrongful act of commission, Carty's crime did not inherently involve fraud.

Nevertheless, the Panel Majority below held that "intent to defraud is implicit in willfully failing to file a tax return with the intent to evade taxes" for purposes of the removal provisions of the Immigration and Nationality Act. In so doing,

---

[3] While not designated as precedent, so-called index decisions such as *Mazza-Alas* "often address novel or unique immigration law issues before the BIA," and "counsel may cite index decisions for persuasive authority or to illustrate an analogous application of a principle of law." Gordon, Mailman & Yale-Loehr, Immigration Law and Procedure, § 3.24 (Matthew Bender 2004).

the Panel Majority became the only court in the nation to so hold. More important for purposes of this Petition, the Panel Majority failed to heed this Court's rejection, in *Scharton*, of the contention that fraud is necessarily implicit in the concept of "evading."

This Court should grant the writ to address this important question.

II. THE PANEL MAJORITY FAILED TO GIVE THE WORDS OF THE STATE STATUTE THEIR NARROWEST POSSIBLE MEANING, IN CONTRADICTION OF *FONG*.

"[D]eportation is a drastic measure and at times the equivalent of banishment [or] exile." *Fong v. Phelan*, 333 U.S. 6, 10 (1948). "[S]ince the stakes are considerable for the individual, we will not assume that Congress meant to trench on his freedom beyond that which is required by the narrowest of several possible meanings of the words used." *Id.* Although *Fong* involved interpretations of federal law, this principle should also apply to interpretations of state law, where state law is a predicate for deportation under federal law. *Cf. United States v. Donahue*, 1993 WL 114031, *8 (E.D. Pa. April 13, 1993) ("The principle of lenity counsels against interpreting [the federal sentencing guidelines] to give the prosecution the benefit of unsettled state law by attaching a more severe penalty classification to a prior [state] offense when a less severe classification is equally applicable" under state law).

In fact, where as here the relevant word in question has not been interpreted by any state court, the federal courts should be even less willing to give the state law a broad interpretation that is unfavorable to the individual.

Because this Court has already rejected the contention that "fraud" is implicit in the concept of "evading," *Scharton*, 285

U.S. at 520-21, reading "evade" to exclude "defraud" is at least one of "several possible meanings" of these words. The Panel Majority should have adopted the *Scharton* Court's narrow reading of these words. Instead, in a circular argument, the Panel Majority appeared to distinguish *Scharton* on the precise ground that this Court gave the words involved a "narrow construction." (App. at 4a & n.5; *see also* App. at 11a (Canby, J., dissenting) ("It is true, as the majority opinion here recites, that *Scharton*'s result depended in part on a strict standard of construction applicable to the extended limitations provision"). But in light of *Fong*, that is precisely why the Panel Majority should have adopted it, not why the Panel Majority should have distinguished it.

This Court should grant the writ to clarify that the rule of construction announced in *Fong* applies to state laws leading to deportation as well as to federal laws leading to deportation.

CONCLUSION

For the foregoing reasons, the Petition should be granted, and the decision below summarily reversed in light of *Scharton* and *Fong*; or the case should be set for plenary briefing and argument on the important question presented herein.

Respectfully submitted,

EDWARD P. SANGSTER
MATTHEW G. BALL
DYLAN B. CARP *
KIRKPATRICK & LOCKHART
NICHOLSON GRAHAM LLP
4 Embarcadero Center, 10th Floor
San Francisco, CA 94111
(415) 249-1000

* Counsel of Record

Counsel for Petitioner

May 20, 2005